

My opinion is, that the proof taken under the *ex parte* commission cannot be read against the defendants who answered the original bill, in support of the allegations of that bill. Upon looking at these answers, it will be found that the plaintiffs are put to the proof of their claim, and are required by evidence to establish their title to a decree. Now, although some of these defendants were in default in not answering the bill of revivor, it seems to me impossible to make out that their default in that particular shall deprive them of the benefit of their answers to the original bill, and that they have forfeited the right to have notice of the execution of the commission issued for the purpose of supporting the allegations of that bill, and yet all the proof taken in this cause in support of the original and bill of revivor has been *ex parte*, and without notice to any of the defendants. The defendants who had answered the original bill were not in default as to that bill, and there is nothing in the first section of the act of 1820, ch. 161, which would authorize an *ex parte* proceeding against them to support by proof the allegations of that bill.

But some of the defendants had answered the bill of revivor, and as to them confessedly the proof taken under the *ex parte* commission could not be read. The second section of the act of 1836, ch. 128, will not help the case. That act only in the cases specified therein making proof taken under a commission in chief evidence against defendants in default.

My opinion, therefore, is, that this case is not now ready. It is, thereupon, this 13th of November, 1848, ordered, that it stand over, with liberty to the parties to proceed as they may be advised, and as the condition of the cause may require.

A. RANDALL and N. HAMMOND, for Complainants.
THOS. S. ALEXANDER, for Defendants.